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C. J. Motion to dismiss

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~458~~. 174

SAMUEL HEPBURN, PLAINTIFF IN ERROR,

vs.

THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE, IN PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED AUGUST 1, 1873.

Oct. 9, 1874

SUPREME COURT OF THE UNITED STATES.

No. 458.

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vs.

THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE, IN PENNSYLVANIA.

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1 [SEAL.] The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

2 Among the records of the court of common pleas of Cumberland County, Pa., of August term, 1872, No. 136, the following proceedings appear, to wit:

Appearance docket entry.

Humrich, Newsham.

THE SCHOOL DIRECTORS OF THE BOROUGH OF Carlisle Pa., *vs.* SAMUEL HEPBURN. } 136. Agreement or case stated. Entered May, 4, 1872.

CASE STATED.

The parties, by paper dated April 30, 1872, agree to certain facts (set forth in said paper) be stated for the opinion of the court in the nature of a special verdict without regard to form, either party to have the right to sue out a writ of error, without oath or bail, May 4, 1872. Opinion of the court filed.

Per curiam inter alia: "Judgment is therefore entered for the defendant."

Judgment. Judgment docket No. 8, page 211.
May 7, 1872. Writ of error filed.

STATE OF PENNSYLVANIA,
County of Cumberland, ss:

I, W. V. Cavanaugh prothonotary of the court of common pleas of said county, do hereby certify that the above is a true copy taken from the records of said court.

Witness my hand and seal of said court May 7, 1872.

[SEAL OF COURT.] W. V. CAVANAUGH,
Prothonotary.

3 *Case stated.*

In the court of common pleas of Cumberland County.

THE SCHOOL DIRECTORS OF THE BOROUGH of Carlisle, Penn'a. *vs.* SAMUEL HEPBURN.

And now, April 30, 1872, it is agreed between the parties to the above-stated case that the following facts be stated for the opinion of the court in the nature of a special verdict, without regard to form, either party to have the right to sue out a writ of error without oath or bail:

That the First National Bank of Carlisle, Penn'a, was duly incorporated on the day of , A. D. 186 , in pursuance of the act of Congress of February 25, 1863, and immediately commenced

and has since continued to carry on the business of banking at said place.

That Samuel Hepburn, the defendant above named, is a resident of the borough of Carlisle, Pa., and is the owner of four hundred and sixty (460) shares of the capital stock of said bank, the par value of which is one hundred dollars per share.

That said stock has been duly assessed by the bank assessor, appointed for that purpose under the provisions of the act of assembly of Penn'a, approved April 12, A. D. 1867, at the value of one hundred and fifty dollars per share—as per Exhibit "A," hereto attached—which assessment was returned to the commissioners of Cumberland County on the third of March, A. D. 1870, and remains on file in their office as a part of the last adjusted valuation of all property, subjects, and things which were made taxable by the laws of this Commonwealth for State or county purposes for the year 1870.

That the real estate, to wit, a house and lot of ground in the borough of Carlisle, owned by said bank, and forming part of the capital stock of said bank, was returned by the assessor of the borough of Carlisle for the year 1870, in the last adjusted valuation of all property subject to taxation for county purposes for that year, at a valuation of $3,200.

That a tax of five mills on the dollar was levied and assessed for county purposes, for the year 1870, on the said real estate owned by said bank, amounting to sixteen dollars, which was paid by Charles H. Hepburn, cashier of said bank, to George Wetzel, county treasurer, on the twelfth day of September, 1870.

4 That a State tax of three (3) mills, and a county tax of five (5) mills on the dollar was levied and assessed by the county commissioners, for the year 1870, on the assessed value of each share of stock of said bank, in the hands of the holder or owner thereof, as per Exhibit B, hereto attached. The State tax, amounting to two hundred and twenty-five dollars, ($225.00,) was paid by the cashier of said bank to the county treasurer on the first day of August, 1870, and the county tax, amounting to three hundred and seventy-five dollars, ($375.00,) remains unpaid.

That the school directors of Carlisle, Pa., by resolution of May 2, 1870, subsequently re-affirmed on the 6th of June, 1870, levied and assessed a school tax for that year of 9½ mills on the dollar upon each and every dollar of the assessed valuation of the real estate owned by said bank, amounting to $340.35, and also a school-tax of 9½ mills on the dollar upon each and every dollar of the assessed value of each share of stock of said bank in the hands of the holder or owner thereof, said tax amounting in the aggregate to $712.50, of which amount $655.50 was levied and assessed upon the 460 shares of stock owned by Samuel Hepburn, the defendant above, as per Exhibit C, hereto attached.

That the school-tax assessed for the year 1870, upon the real estate owned by said bank, amounting to $34.30, was paid by the cashier of said bank to J. W. Eby, treasurer of said school-board, on the 15th day of August, A. D. 1870, but the school-tax assessed upon the bank-stock aforesaid remains unpaid.

That on the 6th May, 1870, the town council of the borough of Carlisle levied and assessed a borough tax of five (5) mills and a bounty tax of three (3) mills on the dollar upon the assessed value of the

5 real estate owned by said bank, and also a borough tax of five (5) mills and a bounty tax of three (3) mills on the dollar, upon each and every dollar of the assessed value of each share of stock of said

bank in the hands of the holder or owner thereof, per Exhibit D, hereto attached, said tax on the real estate amounting to $16.00 *dollars* for borough purposes, and $9.60 for bounty purposes, and on the several shares of bank amounting in the aggregate to $375 *dollars* for borough purposes, and $225 *dollars* for county purposes, of which the sum of $345 *dollars* was levied and assessed for borough purposes, and $207 *dollars* for bounty purposes upon the 460 shares of stock owned by and in the name of Samuel Hepburn, the defendant above.

That the boro' and bounty tax assessed for the year 1870 upon the real estate of said bank was paid by the cashier thereof on the 28th June, 1870, & a receipt taken, of which the following is a correct copy:

"CARLISLE, *June* 28, 1870.

"Rec'd of 1st Nat'l Bank of Carlisle, Penn'a, twenty-five $\frac{60}{100}$ dollars, in full, of the borough and bounty tax for 1870.

"Boro., $16; bounty, 9.60—25.60.

(Signed) "JOSHUA FAGAN,
"*Collector.*"

That on the 19th day of January, A. D. 1871, the said bank formally accepted the provisions of the act of assembly of Penn'a of the 31 March, 1870, relating to the taxation of the shares of stock of national banks, and paid to the treasurer of Pennsylvania one per centum of the par value of said capital stock, amounting to five hundred dollars, ($500,) as per Exhibit E, hereto attached.

6 That, for the year A. D., 1871, county, school, borough, and bounty tax have been assessed on the real estate owned by said bank; but that no municipal taxes whatever have been assessed for that year on the shares or stock of said bank.

1st. If the court shall be of opinion that the shares or stock of said bank belonging to the defendant were liable to taxation at the rates assessed thereon by the plaintiff at the time the same were assessed for the year 1870, then judgment to be entered for the plaintiff for six hundred and fifty-five dollars and fifty cents, ($655.50.)

2d. If the court shall be of opinion that the payment of one per centum of the par value of the capital stock of said bank to the State treasurer on the 19th day of January, A. D. 1871, in compliance with the act of March 31, 1870, exempted the shares of stock of said bank in the hands of the holder or owner thereof from all municipal taxation for the year A. D. 1870, then judgment to be entered for the defendant.

3d. If the court shall be of opinion that the payment by the said bank of one per centum on the par value of said stock to the State treasurer before the 20th January, 1871, exempts the real estate of said bank from all taxation for municipal purposes for 1871, then judgment for the defendant for 34.30.

4th. If the court shall be of the opinion that the school-directors had authority to levy and collect taxes upon and from said bank shares to a greater amount than has been paid to them, under the facts stated, then judgment to be entered for the plaintiffs for such amount as the court may think still due; but if defendant has paid to plaintiffs all the taxes legally due to them upon said bank capital and stock, then judgment for defendant.

5th. If the levy and assessment of said taxes be illegal and
7 void for the reason that they are assessed at the rate of $150 per

share, while the par value thereof is but $100 per share, then judgment for defendant.

C. P. HUMRICH,
H. NEWSHAM,
Att'ys for Pl'ffs.
S. HEPBURN, JR.,
Att'y for Def't.

Filed May 4, 1872.

EXHIBIT A.

List of stockholders of the First National Bank of Carlisle, Cumberland County, Penn'a.

Names.	No. of shares.	Par value.	Assessed value.	Residence.
Samuel Hepburn	460	$100	$150	Carlisle.
Samuel Hepburn, jr	10	"	"	"
Charles H. Hepburn	10	"	"	"
Hopewell Hepburn	10	"	"	"
John G. Orr	10	"	"	"
Total number of shares	500	50,000	75,000	

I hereby certify that the foregoing is a true and correct list of the names of stockholders of the First National Bank of Carlisle, with the number of shares, the par value, & assessed value of shares set opposite their names, respectively.

ELIAS HOLLINGER,
Assessor of 7th District.

CARLISLE, *March* 3, 1873.

8 I certify above is a true copy of original deposited in treasurer's office.

GEO. WETZEL, *Tr. Cumb. Co.*
Per SON.

EXHIBIT B.

County and State taxes on bank-stock for the year 1870.

STATE OF PENNSYLVANIA,
Cumberland County, ss:

We, the commissioners of Cumberland County, do certify that [L. S.] the annexed duplicate of county and State taxes have been duly assessed according to law:

Witness our hands and seal of office, at Carlisle, the sixth day of June, A. D. 1870.

ALLEN FLOYD.
JOHN HARRIS.
JACOB RHOADS.

Attest:
J. ARMSTRONG, *Clerk.*

Stockholders First National Bank, Carlisle.

Names.	No. of shares.	Value.	County.	State.
Hepburn, Samuel, $150	460	$69,000	$345 00	$207 00
Hepburn, Samuel, jr	10	1,500	7 50	4 50
Hepburn, Cha's H	10	1,500	7 50	4 50
Hepburn, Hopewell	10	1,500	7 50	4 50
Orr, J. G	10	1,500	7 50	4 50
Received State tax of above bank	500	$75,000	$375 00	$225 00

I, John B. Floyd, clerk of the commissioners of Cumberland County, do hereby certify that the foregoing is a true and correct copy from the duplicate in this office, in which the bank stocks of the First National Bank of Carlisle is assessed for county and State tax for the year 1870.

Witness my hand and the seal of said office, this 25th day of April, A. D. 1872.

J. B. FLOYD,
Clerk to Commissioners.

9 EXHIBIT C.

At a regular meeting of the board of school directors of the borough of Carlisle, held on Monday, May 2, 1870, all the members being present except Henry Saxton, the following, among other, proceedings were had:

"A communication was received from J. W. Eby, treasurer of the board, setting forth that the financial condition of the school treasury would require the assessments of the same school tax as last year; whereupon,

"It was resolved (all the members present concurring) that the sum of ten thousand five hundred dollars, clear of all expenses of collection, be, and the same is hereby, levied and assessed upon the taxable property, subjects, and things of the borough of Carlisle, made or to be made taxable for school purposes by the several acts of assembly, in order to defray the expenses of maintaining the schools for the school year commencing June 1st, 1870, and that a duplicate in pursuance thereof be prepared and issued to the treasurer, who is authorized to make the same abatements and give the same notices in regard to prompt payment that he was authorized to do last year."

At a regular meeting of the school-board held on the first Monday of June, 1870, viz, the 5th of that month, after the organization of the board by the election of officers for that year, all the members being present, the following resolution was adopted:

"On motion the resolution levying the school-tax for 1870, adopted at last meeting of the board, was unanimously re-affirmed as the same is now on the minutes of the board."

10 In pursuance of the foregoing resolutions, a duplicate of the school-tax levied and assessed for 1870 was prepared and issued to the treasurer of the board on the 17th of May, 1870, with the following warrant:

STATE OF PENNSYLVANIA,
Cumberland County, ss:

{ SEAL OF BOARD OF SCHOOL DIRECTORS. } To Jason W. Eby, treasurer of the school district of the borough of Carlisle, county of Cumberland, and State of Pennsylvania:

In accordance with the acts of assembly establishing and continuing a system of common schools for the said borough, the annexed duplicate of the school-tax for the ensuing year assessed & apportioned on the taxable inhabitants of said district is hereby issued to you, as treasurer aforesaid, enjoining on you the collection of said taxes, first giving the requisite notices as required by law, and in all respects to proceed in the collection of the same as enjoined upon you and required by the several provisions of the acts of assembly aforesaid, and in such other manner to proceed therein as the directors may order and direct, under the provisions of the laws regulating the common schools of said district, for which this shall be your voucher and warrant; the taxes so assessed being levied for the ordinary and other expenses for the school year commencing on the first Monday of June, A. D. one thousand eight hundred and seventy.

Given under my hand and seal, at Carlisle, the 17 May, 1870.

(Signed) E. CORNMAN, *President.*

11 The taxes as levied and assessed upon the real estate of said bank are apportioned in said duplicate as follows:

West ward freeholders.	Valuation.	Whole tax.
Bank, First National	$3,200	$36 00

The taxes levied and assessed upon the shares of stock of said bank are apportioned among the holders or owners thereof in said duplicate as follows:

East ward freeholders.			Valuation.	Whole tax.
Hepburn, Samuel	Bank stock	460 shares, $150	$69,000	$655 50
Hepburn, Samuel, j'r	do.	10 do.	1,500	14 25
Hepburn, Cha's H.	do.	10 do.	1,500	14 25
Hepburn, Hopewell	do.	10 do.	1,500	14 25
Orr, J. G.	do.	10 do.	1,500	14 25

Exhibit D.

At a regular meeting of the town council of the borough of Carlisle, held in the council chamber on Friday, May 6, 1870, the following members being present, viz, Messrs. Sheaffer, Spangler, Black, Lindemood, McCommon, Kennedy, Kutz, and Pague, the following, among other, proceedings were had:

On motion, resolved, that a borough tax of five (5) mills and a bounty tax of three (3) mills be levied and assessed upon the taxable property, subjects, and things of the borough of Carlisle, made or to be made taxable for borough and bounty purposes for the ensuing year, under the several acts of assembly having relation thereto; and that a poll or head tax of fifty (50) cents be imposed for bounty purposes upon such as are liable thereto.

On motion, resolved, that Thursday, May 26, 1870, be fixed for holding the appeals for valuation.

On motion, resolved, that a committee of three (3) be appointed
12 to attend appeal on the part of the borough committee, Messrs. Black, Spangler, & Kennedy.

On motion, resolved, that James Armstrong be directed to make out duplicate for 1870.

I, Andrew J. Wetzel, secretary of the corporation of the borough of Carlisle, do hereby certify that the foregoing is a true & correct extract from the minutes of the proceedings of the town council of the borough of Carlisle in regard to the levying and assessing of the borough and bounty tax for the year 1871, as recorded therein.

Witness my hand and the seal of the corporation this 22d day of April, 1872.

[SEAL OF BORO' OF CARLISLE.] ANDREW J. WETZEL,
Sec'y of Corporation.

EXHIBIT E.

First National Bank of Carlisle in account with the Commonwealth of Pennsylvania, Dr.

For tax on capital stock per act of March 31, 1870, for the year, 1871, as per report herewith filed:

Capital stock	$50,000		
Tax, one per cent		$500 00	
Cashier's commission		25 00	
			475 00

CR.

By pay't into State treasury, Jan'y 19, 1871	$465 00	
" " " " " Jan'y 20, 1871	10 00	
		475 00

Account balanced.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, July 10, 1871.

Settled and entered.

D. C. MAURER, *for*
J. F. HARTRANFT,
Auditor-General.

TREASURY-OFFICE, PA.
Harrisburg, July 11, 1871.

Approved.

THO. NICHOLSON, *for*
R. W. MACKEY,
State Treasurer.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, July 12, 1871.

I hereby certify that the above is a true copy of the original remaining on file in this department.

{SEAL OF AUD. GEN'L PENN'A.} Witness my hand and seal of office the day and year aforesaid.

D. C. MAURER,
For Auditor-General

14 In common pleas of Cumberland Co.

THE SCHOOL DIRECTORS OF THE BOROUGH OF Carlisle
vs.
SAMUEL HEPBURN. } Case stated.

Opinion of the court.

Per curiam, B. F. JUNKIN, *P. J.*

On day of , 186 , the First National Bank of Carlisle, Penn'a, was incorporated under act of Congress of 25th Feb'y, 1863, and ever since has continued to carry on the business of banking. The defendant owns 460 shares of its capital stock, each share, par value, $100; assessed value, $150.00.

For the year 1870 there was assessed against defendant a State tax of $225, which was paid by the cashier.

Also for same year a county tax of $375.00.

Also for same year a school tax of $712.50. (Of this defendant would owe $655.50.)

Also for same year a borough tax of $375.00. (Of this defendant would owe $345.00.)

Also, for same year, bounty tax, $225.00. (Of this defendant would owe $207.00.)

All of the foregoing taxes were upon the capital shares of the bank at their assessed value of $150 per share, par value $100,00.

15 The act of Congress of February 10, 1868, provides "that the shares of any national bank, held by any person, may be included in the valuation of the personal property of such person in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State."

This clause received a construction by C. J. Thompson, in Plesh vs. Hartranft, Legal Gazette, March 11, 1870, and it was held that, "other monied capital" is an expression used in contradistinction to capital invested in stocks. It means the money of individuals segregated, and not as aggregated; and he refers to The People vs. The Commissioners, 4 Wall, 244. He does not question the power of Congress to limit the sovereign power of the State in regard to taxing shares of national banks.

This determination of the chief justice rendered the act of December 22, 1869, which directly imposed a tax of one per centum on the value of the shares of the national banks fruitless; and then came the act of March 31, 1870, section 3: "That all the shares of national banks located within this State, and of banks and savings institutions incorporated by this State, shall be taxable for State purposes at the rate of three mills per annum, upon the assessed value thereof, and for county, school, municipal, and local purposes at the same rate as now is, or may hereafter be, assessed and imposed upon other monied capital in the hands of individual citizens of this State."

Section 4. "That in case any bank or savings institution aforesaid shall elect to collect annually from the stockholders thereof a tax of one per centum upon the par value of all the shares of said bank
16 or savings institution and pay the same into the State treasury on or before the 20th January, in every year, the said shares,

capital, and profits shall be exempt from all other taxation under the laws of this Commonwealth, and the regulating the compensation of county treasurers for receiving moneys for the use of the Commonwealth, and paying over the same is hereby extended to the cashiers of said banks and savings institutions."

The 5th section repeats the 2d & 3d sections of the act of 22d December, 1869. Were it not for Mentzer vs. The County of Montgomery, 5 Smith, 139, it might well be doubted whether any of the former acts of assembly fixing the objects of taxation, would have embraced shares in national banks, because such shares at the time of their passage could not have been contemplated, and are a species of property created by the National Government under peculiar circumstances, for its own special purpose, and the institutions themselves placed in intimate connection with the Government and subject to unusual responsibilities. That until the State imposed within the limitations prescribed by the act of Congress, taxes upon these institutions, they would be exempt under all pre-existing laws. City of Pittsburgh vs. First National Bank, 5 Smith, 45. And the act of 31 March, 1870, is the only act that subjects these shares to school, county, and municipal taxes. But Mentzer vs. The County of Montgomery would make these shares liable under the 32d section of act of 1844.

However, there is another view which we think disposes of this
17 case, and that is this: the State proposed to these banks, along with others, that if, on or before the 20th of January in every year, (4 section of act of 31 March, 1870, above recited,) they would pay a tax of one per centum upon the par value of the shares of said banks, the said shares, capital, and profits shall be exempt from all other taxes, and the banks had until the 20th January, 1871, to elect to accept this proposition and pay the amount.

The First National Bank of Carlisle did accept this offer, and did at the time fixed, or before, pay the amount agreeably to said act.

By law the shares could be taxed three mills, State tax, and no more, but by this offer on the part of the State, a bonus of seven mills was paid to the State, in consideration of release from all other taxes. What other taxes? All others, school, bounty, borough, and county, and these are the taxes claimed in this action, so that the acceptance of this offer, thus made by the State, relieved the shareholders from all the taxes of the year of 1870. It was made on the 31st March, 1870, and the bank had until 20th January, 1871, to accept; and this, whether regarded as the tax for the year 1870 or 1871, was the sole condition. The bank paid the required sum and is exempt, although the State treasurer applied the payment to taxes of 1871. The offer is made in March, 1870, and this school tax was assessed in May, 1870, and should it result in the shares escaping taxation for both years, the terms are proposed and accepted, and no one doubts the power of the legislature to make such a proposition. We therefore think the plaintiff cannot recover the school-tax assessed for 1870, on the shares owned by the defendant in this bank, also that the county, borough, and bounty tax are in no better situation.

The school, bounty, county, and borough taxes for 1870 on the real estate, to wit, the banking-house of this bank, have been paid, but it is agreed by the case stated, that if the school-tax was not legally demandable, judgment may be entered for defendant for the amount thus illegally collected.

18 It is part of the case that the real estate aforesaid assessed at $3,200.00 was paid for out of the capital stock of the bank, and its taxation would result to that extent in double burdens.

Double taxation is not unusual nor illegal, and the 4th section of the act of 20th March, 1870, provides that upon the banks paying one per centum, the "shares, capital, and profits shall be exempt, &c."

The ownership of the banking-house need not necessarily be in the corporation; it may lease a building. Should it be held that whenever the money of the bank is represented by real estate such real estate is exempt, it could happen that a large amount of the real estate of a county might be owned by such banks, and thus the sources of taxation for county, State, and municipal purposes dried up. It is only in reference to corporations owning public works, that it has been held that real estate necessary to the business of the company is exempt. Carbon Iron Co. vs Carbon Co., 3 Wright, 255, where the court say "corporations for mere private purposes can claim no such exemption, and their lands are taxable just as the lands of individuals are, unless expressly exempt."

This is followed by the Lackawana Iron & Coal Co. vs. Luzerne County, 6 Wright, 424, to same effect. We therefore consider that the First National Bank of Carlisle, but a private corporation, falls within the above rule, and that its real estate is subject to county, State, school, borough, and bounty tax, and as this has been paid for the year 1870, there
19 can be no judgment entered for that.

There is submitted another question, which, if we are correct in our previous conclusions, becomes unimportant, as it cannot advantage the one side nor injure the other, to wit: Can the assessor appointed under the second section of the act of April 12, 1867, by the auditor-general and treasurer, assess these shares of national bank stock beyond their par value? Said section requires him to ascertain their par value and their actual value. We would suppose that their par value is the maximum, and that no share could be valued higher; but it may happen that the stock is under par, and then the valuation shall be actual; and that the language employed is used in this sense. For if the assessor may add to the value beyond par, as in this case, fifty per centum, then will the State be taxing these bank shares differently from "other monied capital in the hands of individual citizens of the State," by means of the assessments. All our acts require the return for taxation of the principal sum, not the interest; and where a man was actually receiving nine per cent on $100 at interest, it has never been required that he returns this as a loan of $150, or as yielding him the interest on $150. If the banks must do this, can be thus taxed, then are they differently taxed from "other monied capital in the hands of individual citizens of the State." When taxes are assessed upon the principal sum, as against the individual citizens of the State, the act of Congress requires it to be so assessed against the shares of the national banks; for this is the limitation prescribed by the Federal act of February 10, 1868. Judgment is therefore entered for defendant.

By the court.

MAY 4, 1872.

Filed May 4, 1872.

20 In the supreme court of Pennsylvania, in and for the middle district, set.

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Cumberland, greeting:

{SEAL OF SUP. C'T OF PA., MID. DIST.} Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same

court, by our writ between The School Directors of the Borough of Carlisle, plaintiff in error, and Samuel Hepburn, (No. 136, Aug. T, 1872,) defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the second Monday of May, instant, and this writ, that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 6th day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Commonwealth the 96th.

ROB'T SNODGRASS,
Prothonotary.

21 (Indorsed:) No. 84. May term, 1872. Supreme court of Pennsylvania, middle district. The school directors of the Borough of Carlisle, plaintiffs in error, vs. Samuel Hepburn, defendant in error. Filed in sup. c't May 16, 1872. Writ of error to the court of common pleas for the county of Cumberland. Returnable the second Monday of May, 1872. Rule on the defendant in error to appear and plead on the return-day of the writ.

"N. B. 20 days notice to the parties or their counsel below is necessary to compel an appearance."

ROB'T SNODGRASS,
Proth'y.

Filed com. pleas, May 7, 1872.

HUMRICH & NEWSHAM.

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

ROB'T MONTGOMERY. [L. S.]

22 *Docket entries, supreme court of Penn'a.*

Among the records and proceedings of the supreme court of Pennsylvania, sitting in and for the middle district, to May term, 1872, No. 84, it is contained as follows:

THE SCHOOL DIRECTORS OF THE BOROUGH of Carlisle
vs.
SAMUEL HEPBURN.

Writ of error to the court of common pleas of Cumberland County, No 136, August T., 1862.

1872, MAY 6.—Præcipe for writ of error filed. Eo die, writ of error to the court of common pleas of Cumberland County, issued. Returnable on the second Monday of May, 1872.

1872, MAY 16.—Writ of error returned, with record from the court of common pleas of Cumberland County, and filed.

1872, MAY 18.—Called for argument & continued.

1873, MAY12.—Asssignment of error filed. Eo die, called for argument and argued. And now, July 2, 1873, this cause came on to be heard, and, on due consideration thereof, it is ordered that the judgment of the court below be reversed; and now judgment for the plaintiff against the defendant on the case stated for six hundred and fifty-five dollars and fifty cents.

Per curiam.

WILLIAMS, *J.*

1873, JULY 17.—Petition for citation & writ of error from Supreme Court of the United States; citation to defendant in error; writ of error from the Supreme Court of the United States, returnable second Monday of October next, allowed by Hon. Jos. P. Bradley, associate
23 justice, and writ of error bond in the penalty of $2,000, approved by Hon. Jos. P. Bradley, associate justice, and citation to defendant in error received and filed. Eo die, copy of writ of error and pro'*ff* of service of citation on defendant in error received and filed.

Certified from the record.

[SEAL.] ROB'T SNODGRASS,
Prothonotary.

24 In the supreme court of Pennsylvania for the middle district.

THE SCHOOL DIRECTORS OF THE BORO' OF Carlisle, plaintiffs below, plaintiff in error,
vs.
SAMUEL HEPBURN, DEFENDANT BELOW, DEfendant in error.

Issue writ of error to the court of common pleas of Cumberland County, to bring up the record and proceedings in a certain case depending therein to No. 136 of August term, 1872, returnable to May term, 187'.

C. P. HUMRICH,
H. NEWSHAM,
Attorneys for Plaintiff in Error.

To ROB'T SNODGRASS,
Proth'y Supreme Court of P'a, Middle District.

This being a stated case, the oath and bail not required, by agreement of plaintiffs' & defendant's counsel.

(Endorsed:) Filed May 6, 1872.

25 *Error assigned.*

The court erred in directing judgment to be entered for the defendant.

Judgment entered July 2, 1873, as follows:

And now, July 2, 1873, this cause came on to be heard, and, on due consideration thereof, it is ordered that the judgment of the court be-

low be reversed, and now judgment for the plaintiffs against the defendant on the case stated for six hundred & fifty-five dollars and fifty cents.

Per curiam.

WILLIAMS, *J.*

26 In the supreme court of Penna., middle district, ss: No. 84 May 3, 1872.

THE SCHOOL DIRECTORS OF THE BOROUGH of Carlisle. *vs.* SAMUEL HEPBURN. } Error to the com. pleas of Cumberland County.

Opinion by WILLIAMS, J.

It may be conceded that the defendant's stock would have been exempt from the tax levied on its assessed value by the school directors by resolution of the 2d May, 1870, if the bank had paid a tax of one per centum on the par value of its capital stock for that year. But it did not, as the case stated shows, and therefore the stock was taxable for State, county, school, and other purposes under the third section of the act of 31st May, 1870, P. L. 42. On the 18th of August, 1870, the bank paid a State tax of three mills on the assessed value of its stock for that year, and on the 19th of January, 1871, it paid into the State treasury a tax of one per centum on the par value of its capital stock which, as the account settled by the auditor-general shows, was the tax for that year.

The payment of this tax was made under the provisions of the
27 fourth section of the act, and it exempted the stock from all other taxation for the year 1871, but it did not discharge the taxes which had been levied & assessed under the third section of the act the previous year. Everitt vs. Louden, Leg. Intel., vol. 29, p. 366. Price vs. Com'rs of Montgomery Co., decided at Phila., Jan'y term, 1873. The defendant's stock was not taxed at a higher rate on its assessed value than other moneyed capital in the hands of individual citizens, and it does not follow that the tax imposed by the school directors was illegal & void, because the stock was assessed at one hundred & fifty dollars per share while its par value was but one hundred dollars. The school directors in imposing the tax did not assess or fix the value of the defendant's stock. They levied the tax on its assessed value as returned by the assessor, and this was clearly right, for they had no other basis on which to levy it. The assessment was made under the act of 12th April, 1867, P. L. 74, and 2d April, 1868, P. L. 55, by assessors appointed by the auditor-general and State treasurer. It was their duty under these acts to assess the value of the stock, but not to appraise it higher than its current value in the market where the bank is located.

28 If they had no right, under the act of Congress, to appraise the stock above its par value for purposes of taxation, the defendant should have appealed to the auditor-general under the provisions of the act of 2d April, 1868, for such an abatement of its assessed value as would reduce the assessment to its par value. Having failed to appeal the defendant must be deemed to have waived all objections that he might have made to the assessment & he cannot now object that the tax is illegal & void because it was levied on an assessment that was erroneously made. The objection comes too late, and therefore he cannot set up as a defence to this action that the taxation of his stock was illegal because the tax was levied on an assessment made on the basis of its current value in the market instead of its par value. His only remedy

for the alleged illegal assessment was an appeal to the auditor general, & having failed to appeal he is concluded by the assessment. Clinton School Districts appeal, 6. P. F. Smith, 315; Stewart vs. Maple, 20 ib., 223. Everitt vs. London, supra. It follows that the plaintiffs under the case stated, are entitled to judgment for the amount of the tax they
29 levied and assessed on the defendant's stock, and that the court below erred in entering judgment for the defendant.

Judgment reversed and judgment for the plaintiffs against the defendant on the case stated for six hundred and fifty-five dollars and fifty cents.

A true copy certified from the record.

Attest my hand & official seal this 8th day of July, 1873.

[SEAL.] ROB'T SNODGRASS,
Prothonotary.

Filed July 2, 1873.

(Indorsed:) The School Directors of the Boro' of Carlisle vs. Samuel Hepburn. Opinion by Williams, J. Certified copy.

30 To the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States.

The petition of Samuel Hepburn respectfully shows that, on the 30th day of April, 1872, a suit was instituted in the court of common pleas of Cumberland County, and State of Pennsylvania, wherein the School Directors of the Borough of Carlisle were plaintiffs, and the said Samuel Hepburn was defendant; that such proceedings were had thereon that on the 2d day of July, A. D. 1873, a final judgment was rendered in said suit in the supreme court of the State of Pennsylvania for the middle district, (said suit being No. 84 of May term, 1872,) in favor of plaintiffs and against said defendant for $655.50, with interest from July 2d, A. D. 1873, said supreme court being the highest court of law or equity in said State. That in said suit was drawn in question the validity of a statute of the State of Pennsylvania, on the ground that the said statute was repugnant to and in conflict with the statutes of the United States creating national banks and regulating the manner of taxing the same, and that the decision of said State court was in favor of the valid-
31 ity of said statute, as appears by the record in said case.

Your petitioner, therefore, believing that in the rendering of said judgment, as above stated, error hath intervened, prays your honor to allow a writ of error to issue to remove said cause to the Supreme Court of the United States, that said court may further cause to be done to correct said error what is right and according to the customs and laws of the United States ought to be done, and he will ever pray &c.

SAM'L HEPBURN.

(Indorsed:) Sam'l Hepburn vs. The School Directors of the Borough of Carlisle. Petition for citation, &c.

A writ of error is allowed as within and above is prayed for. Dated at Washington, July 14th, 1873.

JOSEPH P. BRADLEY,
Associate Justice of Sup. Ct. U. S.

Filed in the office of the proth'n'y of the supreme court of Penna., for the middle district, July 17, 1873.

32 And now here, on this day, to wit, July 17, 1873, the said Samuel Hepburn produced to our said supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgments aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is in the words and of the tenor following, to wit:

33 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania:

[SEAL.] The President of the United States to the judges of the supreme court of the State of Pennsylvania, being the highest court of law or equity in said State, greeting:

Because that in the record and process, and also in the rendition of the judgment, in a suit before you, between Samuel Hepburn, a citizen of Pennsylvania, plaintiff in error, and The School Directors of the Borough of Carlisle, in Pennsylvania, defendants in error, (said suit being No. 84 of May term, 1872, of the middle district of said supreme court of Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution and laws of the United States, is said to have been drawn in question, and the decision to have been in favor of the validity of the said statute, a manifest error hath happened, to the great damage of the said plaintiff in error, as in his complaint hath been alleged; and as it is just and proper that the error, if any there be, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

34 we do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court, the fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety-eighth year of the Independance of the United States.

D. W. MIDDLETON,
Clk Sup. C't U. S.

(Indorsed:) Sam'l Hepburn vs. The School Directors of the Boro' of Carlisle. Writ of error. Allowed July 14, 1873. Joseph P. Bradley, associate justice Supreme C't U. S. Filed in the office of the proth'y of the supreme court of Penn'a, for the middle district, July 17, 1873.

35 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

36 In the Supreme Court of the United States.

SAMUEL HEPBURN, DEF'T BELOW & PL'FF IN error,
vs.
THE SCHOOL DIRECTORS OF THE BORO' OF CARLISLE, pl'ff below & def't in error.

Know all men by these presents that we, Samuel Hepburn and L. T. Greenfield, both of Carlisle, Cumberland County, State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of two thousand dollars, to be paid to said Commonwealth of Pennsylvania, her certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 9th day of July, A. D. 1873.

Whereas the above-named Samuel Hepburn hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of
37 Pennsylvania, being the highest court of law or equity in said State.

Now, therefore, the condition of this obligation is such that if the above-named Samuel Hepburn shall prosecute his said writ of error with effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(S'd) SAM'L HEPBURN. [SEAL.]
(S'd) L. T. GREENFIELD. [SEAL.]

Sealed and delivered in presence of us, who also witness that the words "fail to," on first line, page second, were interlined before signing of above bond.

(S'g'd) S. HEPBURN, JR.
(") CHA'S H. HEPBURN

(Indorsed:) Sam'l Hepburn vs. The School Directors of the Boro' of Carlisle. Bond.

Approved July 14th, 1873.
(S'g'd) JOS. P. BRADLEY,
Associate Justice Sup. C't U. S.

38 The United States of America to the school directors of the borough of Carlisle, greeting:

You are hereby cited and enjoined to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein Samuel Hepburn is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment against said plaintiff in error in a suit No. 84 of May term, 1872, of the supreme court of Pennsylvania, for the middle district of said State, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this 14th day of July, A. D. 1873.

JOS. P. BRADLEY,
Associate Justice of Sup. C't U. S.

(Indorsed:) Sam'l Hepburn v. The School Directors of the Boro' of Carlisle. Citation. Filed in the office of the proth'y of the supreme court of Penn'a, for the middle district. July 17, 1873.

39 STATE OF PENNSYLVANIA,
Cumberland County, ss:

On this 19th day of July, A. D. 1873, personally appeared before me, a notary public in and for the county aforesaid, Sam'l Hepburn, jr., who, being sworn, did depose and say that, on the 17th day of July instant, he did leave with E. Cornman, esq., president of the board of school-directors of the borough of Carlisle, a true and correct copy of the citation to appear before the Supreme Court of the United States on the second Monday of October next, issued by the Hon. Jos. P. Bradley, justice of the said court, in the case of Sam'l Hepburn vs. The School Directors of the Borough of Carlisle, said case being No. 84 of May term, 1872, in the supreme court of Pennsylvania, for the middle district.

S. HEPBURN, JR.

Witness my hand and official seal the day and year above written.
[NOTARIAL SEAL.] J. M. ALLEN,
Notary Public.

40 STATE OF PENNSYLVANIA, *ss*:

I, Robert Snodgrass, prothonotary of the supreme court of Pennsylvania, in and for the middle district, do hereby certify that the within and foregoing contained on pages one to thirty-seven inclusive is a full, true, and complete copy and transcript of the record and proceedings of the said the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the cause lately depending therein to No. 84 of the May term, 1872, wherein The School Directors of the Borough of Carlisle were plaintiffs in error, and Samuel Hepburn was defendant in error.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme for the middle district, at Harrisburg, this 25th day of July, A. D. one thousand eight hundred and seventy-three.

ROB'T SNODGRASS,
Prothonotary of the Sup. C't of Pa., Middle District.

(Indorsement on cover:) No. 458. Samuel Hepburn, plaintiff in error, vs. The School Directors of the Borough of Carlisle, in Pennsylvania. Pennsylvania sup. court. Filed 1st August, 1873.

REC. 458—2

O

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

SAMUEL HEPBURN, *Plaintiff in Error*,
vs.
THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE IN PENNSYLVANIA.
No. 456.

MOTION BY DEFENDANTS IN ERROR TO DISMISS THIS CASE FOR WANT OF JURISDICTION.

And now come the defendants in this cause and move the court to dismiss the same for want of jurisdiction, for that the cause is brought up by writ of error to the supreme court of the State of Pennsylvania, and in said cause in the courts of said State no question arose of which this court has jurisdiction.

Brief.

This suit was to recover a tax assessed upon certain shares of national bank stock held by the defendant.

The case was submitted to the court upon an agreed state of facts, (record, pp. 1, 2,) and upon certain questions of law arising thereon. (Record, p. 3.) It was decided against the plaintiffs by the county court, but in the supreme court of Pennsylvania the judgment of the county court was reversed and judgment given for the plaintiffs.

The agreed state of facts sets forth:

1. That the plaintiff in error was the owner of 460 shares of national bank stock of the par value of $100, and that the same had been assessed in March, 1870, as of the actual or market value of $150 per share, or for the whole, $69,000.

2. That the school directors had levied on such assessed value, school taxes for the year 1870, to the amount of 19 mills per $100, amounting to $655.50, which taxes had not been paid, and this action was brought to recover the same.

3. That certain other State, county and borough taxes had been levied and collected on the same assessed value; and also upon the real estate of the bank.

Upon this state of facts the parties submitted for the opinion of the court the five propositions found in the record, at page 3, and agreed that judgment should be rendered according to the determination of the questions thus presented.

No provision of the Constitution or statutes of the United States is referred to in the agreed case or in the record, except the act of February 25, 1863, under which the bank was incorporated. No exemption right or privilege is set up or claimed under that act or under any act of Congress or provision of the Constitution. Nor is the construction of that act or of any act expressly drawn in question in the record in the cause.

But in the opinions of the courts, which are sent up with the record, one act of Congress and three State statutes are referred to; the act of Congress referred to being that of February 10, 1868, which provides "that the shares of any national bank held by any person may be included in the valuation of the personal property of such person in the assessment of taxes imposed by or under State authority, at the place where such bank is located and not elsewhere, but not at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State."

The State statutes referred to are; 1st, act of April

12, 1867, under which the bank stock was assessed; 2d, an act of April 2, 1868,; and, 3d, the act of March 31, 1870, which offered to the banks the option of paying a tax of one per cent. upon the par value of their capital stock in lieu of all other taxes.

The agreed case finds that the banks on the 19th of January, 1871, accepted the provisions of the last mentioned State act.

Upon an examination of the five propositions submitted to the court as containing the law of the case, it will be found that no question was raised as to the construction of the act of Congress.

The first and fourth propositions relate to the rates of taxation and the power of the school directors to levy and collect taxes to such an amount.

The second and third propositions relate to the effect of the acceptance by the bank on the 19th of January, 1871, of the provisions of the State statute of March 31, 1870, for commuting the tax—whether such acceptance exempted the bank from payment of the taxes for the year 1870 or only from the payment of those for 1871.

The fifth proposition is the only one remaining, and although it seems from the opinions of the courts that some question was attempted to be made under the act of Congress of January 10, 1868, above cited, neither court found it necessary to construe the act, the county court having held that stock of bank was exempt from taxation by the acceptance of the terms of the State statute of March 31, 1870, and the supreme court of the State having held that the only right the defendant could set up under the act of Congress, would be to an abatement of the valuation, and that such a claim must be made by appeal to the auditor general according to the provisions of a State statute of April 2, 1868, and that having failed to object to the valuation, the defendant could not now object to the tax, on the ground that the valuation was erroneous. (Opinion, Rec., p. 13.)

We submit that the mere fact that the defendant attempted, in the State court, to make an argument on the terms of the act of February 10, 1868, is not the setting up of an exemption or right under such act, so as to make a question of which this court has jurisdiction. The record does not show that the stock in question was assessed at a greater rate than other monied capital in the hands of individuals. It simply shows that it was assessed as being in value above par. There is nothing in the act of Congress that purports to exempt such property from being assessed at its true value. Nor is their anything in the record, or in the nature of the case, to authorise the presumption that being assessed above its par value it was therefore assessed above its real value. There is nothing to show, nor is it suggested, that the stocks of other banks were not in like manner assessed at their real value, whether above or below par.

We submit that in order to raise a federal question, the case below must show, or attempt to show, that some specified act of Congress was disregarded. No such attempt is made in the case stated, but the plaintiff in error has contented himself with stating the question in the most general terms, whether the levy and assessment was not illegal and void for reason that his stock was assessed at more than its par value, without stating any reason whatever why it should not be so assessed, but leaving himself at liberty to sustain his objection by reference to any law, constitutional or statutory, state or federal, or any municipal ordinance, which at the hearing, he might be advised to invoke, as making "the levy and assessment * * illegal and void."

Conclusion.

We submit that the writ of error should be dismissed.

J. M. CARLISLE,
J. D. McPHERSON,

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

SAMUEL HEPBURN, PL'FF IN ERROR,

vs.

THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE, IN PENNSYLVANIA.

No. 458.

In Error to the Supreme Court of the State of Pennsylvania.

MOTION BY DEFENDANT IN ERROR, TO DISMISS FOR WANT OF JURISDICTION.

BRIEF ON MOTION TO DISMISS.

JOSEPH CASEY,
Attorney for Pl'ff in Error.

WASHINGTON, D. C.
PRINTED BY POWELL & GEHOK, 633 F St.
1874.

In the Supreme Court of the United States.

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vs.
THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE IN PENNSYLVANIA.
No. 456.

MOTION BY DEFENDANTS IN ERROR TO DISMISS FOR WANT OF JURISDICTION.

This motion is made on the ground of want of jurisdiction. And that the particular statute or provision of the statute of the United States, relied upon by the plaintiff in error and decided against, by the State court, does not appear in the record.

This raises three questions:

1st. Does it expressly appear in the record that an exemption was claimed under a statute of the United States, which was disallowed by the State court?

2d. Does it appear by clear and necessary intendment that the question was involved in the decision?

3d. Could the Supreme Court of Pennsylvania have given the judgment it did, without necessarily deciding this question adversely to the plaintiff in error?

The first position of plaintiff in error, in the State court, was, that under the 4th section of the act of Assembly of Pennsylvania of March 31, 1870, *any State or national bank could collect annually from its shareholders a tax of one per cent. upon the par value of all the shares of such bank, and pay the same into the State Treasury on or before 20th January in*

every year, whereupon such shares should be exempt from all other taxation under the laws of that commonwealth.

This national bank accepted the provisions of this act. And before the time limited in it, paid the one per cent., and claimed exemption from further taxation by virtue of the 41st section of the act of Congress, June 3, 1864, 13 Stat., 112; and the act of February 10, 1868, 15 Stat., 34.

And whether these last named statutes, exempted these shares from any other tax than the one per cent., was one of the questions argued and decided in the State court.

No privilege or exemption from any part of the taxation was claimed under the State laws, and it must, therefore, have been under the laws of the United States.

In the case of Crowell *vs.* Randall, 10 Pet., 368, so often referred to, in which Judge Story reviews the prior cases, one of the conclusions reached was:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in *ipsissimus verbis;* but that it is sufficient, if it appears by clear intendment that the question must have been raised and must have been decided in order to have induced the judgment."

This case stands in the very attitude of Smith *vs.* The State of Maryland, 6 Cranch, 286. They claimed exemption there under the treaty. The court decided against the party setting up the treaty. We claimed exemption from taxation under the acts of Congress of 1864 and 1868, and on no other ground, and the State court decided against us.

The same is also strictly true of Martin *vs.* Hunters, lessee, 1 Wheat., 304.

So in Miller *vs.* Nichols, 4 Wheat., 311, 315, Ch. J. Marshall, says:

"It would have been sufficient to give this court jurisdiction, that the record should show that an act of Congress was applicable to the case."

In Wilson *vs.* The Black Cr. M. Co., 2 Peters., 245.

"It is sufficient to bring the case within the jurisdiction, that a law of the United States must have been misconstrued, or the decision could not have been made." So are all the cases reviewed by Judge Story.

In Armstrong *et al. vs.* The Treasurer, &c., 16 Pet., 281.

The same doctrine is reiterated, and held that the jurisdiction may be sustained by showing:

"That the State court could not have given the judgment or decree passed, without deciding such question."

To the same point is the case of Bridge Proprietors *vs.* Hoboken Co., 1 Wall., 143, where the same ruling was affirmed.

His honor, Mr. Justice Davis, varies the expression of the same idea, in Freeman *vs.* Nichol, 8 Wall., 56.

"It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did."

The case of Messenger *vs.* Mason, 10 Wall., 507, which appears to require the particular law and clause of the Constitution involved in the case, to be specially set forth in the record, does not appear to be sustained in all its extent, by the current of the decisions upon this point.

Upon the authorities thus far cited, and under the act of 1789, we think there is enough upon this record to sustain the jurisdiction.

It appears, *at least, by necessary intendment,* that the question on these acts of Congress was made in the State court, and decided adversly to the plaintiff in error.

But how stands the case upon the act of February 5, 1867, 14 Stat., 386?

In Dooley *vs.* Smith, 13 Wall., 604, no question on this statute was raised, but the former positions were sustained, Mr. Justice Miller saying:

"We are satisfied, from a careful examination of the record, that this latter question was decided against the validity of those statutes, (legal tender laws,) and that such decision was essential to the judgment rendered."

In one of the last reported cases on the subject, Smith *vs.* Adsit, 16 Wall., 189, Mr. Justice Strong, referring to Crowell *vs.* Randell, Parmelee *vs.* Lawrence, Williams *vs.* Norris, and Rector *vs.* Ashley, says:

"The record must show either expressly or by necessary intendment, not only that a Federal question was raised, but that it was decided adversely to the party, who has caused the case to be removed here."

So in Pennywit *vs.* Eaton, 15 Wall., 380, the jurisdiction was sustained, although *the question was raised obscurely.*

I take it then, on the two acts of 1789 and 1867, under the reported decisions of this court, it must appear by the record either in express terms or by intendment that a Federal question, was involved in the decision of the State court, and that decision must have been adverse to the plaintiff in error.

The question in the case at bar is, do these things appear in the mode required?

The legislature of Pennsylvania, by act of February 23, 1866, enacted:

"It shall be the duty of the cashier of every bank in the Commonwealth, whether incorporated under the laws of this State or of the United States, to collect annually, from every stockholder of said bank, a tax of one per centum upon the par value of the stock held by said stockholder, and to pay the same into the State treasury, on or before the first of July in every year hereafter, commencing on the first day of July, A. D. 1866. And the said stock shall be exempt from all other taxation under the laws of this Commonwealth."

The act of April 12, 1867, Purd. Dig., 1480, pl. 8, 9, 10, 11, 12, 13.

By the 5th section it is enacted:

"Should any National or State bank of this Commonwealth pay to the State treasurer a tax of one per centum per annum upon the par value of the capital stock thereof, the shareholders of said bank shall be exempt from all other taxation on the value of said shares."

The act of April 2, 1868, Purdon, 1534, pl. 13, *et seq.* the 1st section is as follows:

"No stock or share of any National Bank shall be appraised higher than the current value of said stock in the market where such bank is located; and any stockholder shall have the right of appeal to the Auditor General, who shall have the power to adjust such assessments by inquiring into the value of such stock, and either abate or increase the value of the same as may be just and proper."

The 10th section of the act of May 1, 1868, Purd., 1536, enacted:

"It shall be the duty of the cashier of every bank and saving's institution incorporated under the laws of this State, to collect annually from every stockholder of said bank or saving's institution, a tax of one per centum upon the par value of the shares held by said shareholder, and to pay the same into the State treasury on or before the first day of July in every year; and the said shares shall be exempt from all other taxation under the laws of this Commonwealth."

The act of March 31, 1870, Purd., 1643, pl. 4 and 5, provides:

"That the shares of National Banks shall be taxable at the rate of three mills upon the assessed value, and also for county schools, municipal and local purposes, at the same rate as now is, or may be hereafter assessed upon other moneyed capital in the hands of individual citizens of this State."

Section 4 enacts:

"In case any bank or saving's institution shall elect to collect annually from the shareholders thereof a tax of one per centum upon the par value of all the shares of

said bank, and pay the same into the State treasury on or before the 20th day of January in every year, the said shares, capital, and profits shall be exempt from all other taxation under the laws of this Commonwealth."

The main questions raised upon this record were:

First. The right of these local and municipal authorities to assess and tax these shares at all, under the act of March 31, 1870, and the acts of Congress of 1864 and 1868.

Second. The question on the act of Congress is distinctly raised in points 1st and 5th, that the assessments above par were unwarranted and illegal.

I. The record very clearly raises in the 1st and 5th points the two questions—1st. That the local authorities had no right to tax at all; and 2d. If they had, it must be on the par value of these shares.

The opinion of the Supreme Court of the State, that the plaintiff in error was bound to appeal from this invasion of his rights, under the laws of Congress, to an executive officer of a State, whose decision was to be final and conclusive, is a proposition that surely cannot be maintained. Whether he was liable for the tax, and if so, whether the spirit and intention of the laws of Congress, limited the rate to the par of the shares, were purely judicial questions. It was not the ascertainment of the value but the right to exceed the par. It was not the form of assessment, but the right to assess or tax in that manner or to that extent.

The case of Van Allen *vs.* The Assessors, 3 Wall., 573, it appears to me strongly leans against the assessments of these shares, at a greater rate than the par value. The point was directly decided by Judge Blodget. (Chicago Legal News, August 19, 1871.) Holding that an assessment under a State law of Illinois of those shares, at a higher rate than par, was contrary to the design and spirit of the acts of Congress.

Because if the State authorities can arbitrarily fix the value of these shares, the acts of Congress restricting taxation to the rate applied to the monied capital of individuals is illusory and a nullity.

In this case the taxes assessed upon these shares, in addition to the other taxes paid by the bank, amounted to nearly four per cent. upon the par value. A rate sufficient to tax every National Bank in the country out of existence.

Now, the Supreme Court of Pennsylvania, it appears to me, evades the question of the right to tax these shares above par, when it says the plaintiff in error should have appealed to the Auditor General. It was a right secured to him, as he supposed, under an act of Congress, and when assailed he had a right to test the matter in the courts, and have it decided by the Federal Court of last resort. The act of April 2, 1868, sec. 1, is as follows:

"No stock or share of any national bank shall be appraised higher than the current market value of said stock in the market where such bank is located; and any stockholder shall have the right of appeal to the Auditor General, who shall have power to adjust such assessment by inquiring into the value of such stock, and either abate or increase the value of the same as may be just and proper."

Now the Supreme Court of Pennsylvania confounded the mode of executing the power of valuation, with the right to exercise it at all. It was the latter question our points raised. That a subordinate, executive officer like the Auditor General of the State, could determine our right under an act or acts of Congress, in such manner as to preclude judicial congnizance, I submit, with great respect, cannot be maintained.

That is exactly our case. We raised and presented to the Supreme Court of the State, our exemption under the acts of Congress, from assessment of our shares above par. True, says the Supreme Court of Pennsylvania, you did;

but under a law of the State, you must submit that question to the Auditor General of the State, whose decision is final and conclusive. The State legisture can pass no such law. No State court can deprive us of our review here by such disposal of the question.

But the State legislature had no idea of conferring any such right or power upon the Auditor General. It was only intended that he should decide upon the fairness or regularity of the assessment. Far other is the question we raised, and upon which, if permitted, we shall invoke the decision of this court in due time. The question was, whether under the act of Congress of February 10, 1868, 15 Stat., 34, any other than the three-mill State tax could be laid upon these shares.

In this act the clause in relation to State banks, found in the act of 1864, is left out. And the sole restriction is, "that the taxation shall not be at a greater rate than is assessed upon *other moneyed capital* in the hands of individual citizens of such State."

The only tax assessed upon "other moneyed capital in the hands of individuals" by the State of Pennsylvania, is three mills upon the dollar for State and municipal purposes; and this is clearly their limit in regard to these shares under the act of February 4, 1868.

A tax of one per cent. levied upon these shares, by the State authorities, under the Act of Assembly of Pennsylvania, of December 22, 1869, was held by the Supreme Court of that State to be contrary to the act of Congress of February 10, 1868, and, therefore unconstitutional and void. (See Gorgas *vs.* Wetzel, Treasurer (not yet reported). Decided in Autumn of 1872.

Now the case raised distinctly the question of the right to tax these shares for borough, school and county purposes. *The bank had paid the three mill tax* in August, 1870. This, we contended, exempted them from further taxation. The Supreme Court of Pennsylvania decided

against us. Does this raise a question cognizable by this court?

Our positions were, therefore—

1st. That the shares, under the act of Congress, could not be assessed above par.

2d. That they, by the act of Congress of 1868, and the tax laws of Pennsylvania, were not subject in 1870 to any other than a State tax of three mills on the dollar, and not liable to local or municipal taxes at all.

3d. They were exempt by the payment of the tax of one per centum on the par value of their shares under the act of March 31, 1870.

If these federal questions were not in the case, then there could have been no contest, for none was made on the State laws.

But these questions are distinctly made in the case stated; and the decision of the court is against us on all of them. We think the jurisdiction of the court appears by necessary intendment, on the record now before the court.

But if I am mistaken in these positions, then apart from these considerations the question of jurisdiction here is, at least, one of doubt. It depends upon the questions raised and decided in the state court. These can only be fully developed upon the final hearing and argument of the case upon its merits. Such being the case, this court will not undertake to decide this important question upon a motion to dismiss.

And I so understand the ruling of this court in the cases of—

Tucker *vs.* Fowler, 1 Black, 95.
Railroad *vs.* Morgan, 10 Wall., 256.
Semple *vs.* Hagan, 4 Ibid., 431.

In this latter case the court says:

"In many cases the question of jurisdiction is so involved with other questions that the court cannot eliminate it without a careful examination of voluminous records,

and passing upon the merits. When this occurs, the motion will not be granted, but the question of jurisdiction will be heard on the final argument on the merits."

To dismiss this cause on this motion would be to decide this whole case on its merits on a motion to dismiss. This is the very thing denied in Hecker *vs.* Fowler, 1 Black, 95.

I submit, therefor, to the court—

1. That the questions of the right to exemption from the taxes mentioned in the case stated, *is expressly raised*, under the act of Congress of February 10, 1865, and decided against us.

2. If not *expressly* stated they are at least *impliedly and by necessary intendment* raised upon the record, and decided adversely to the plaintiff in error.

3. That if mistaken on both these points, the question of jurisdiction is so interwoven and blended with the merits, that the court will postpone a decision upon the same until the final hearing on the merits. For these reasons we humbly submit that this motion should be denied.

JOS. CASEY,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 174.

SAMUEL HEPBURN, PLAINTIFF IN ERROR,

vs.

THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE, PENNSYLVANIA.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF PLAINTIFF IN ERROR.

JOS. CASEY,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1914.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 174.

SAMUEL HEPBURN, PLAINTIFF IN ERROR,

vs.

THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE, PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

History of the Case.

The plaintiff in error, Judge Hepburn, is a citizen of Pennsylvania, and resided at the borough of Carlisle, in that State. He owned 460 shares of stock in the First National Bank of Carlisle. This bank was incorporated under the national banking laws, in 1864, and has since conducted the business of banking under the laws of Congress.

This stock was assessed by the bank assessor appointed under the act of Assembly of Pennsylvania, approved April 12, 1870, at the value of one hundred and fifty dollars per share, the par value of said shares being one hundred dollars each. This assessment was returned to the commissioners of Cumberland county, and remains as part of the adjusted valuation of taxable property under the laws of the Commonwealth.

three mills per annum, upon the assessed value thereof: *And for county, school, municipal and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this State.*"

There does not seem to be any doubt or dispute, or any room for either, that this moneyed capital in the hands of individuals, means private investments other than in stocks, or securities. It refers, doubtless, to loans upon bond and mortgage—upon collaterals, upon real or personal securities; and to the various modes by which individuals invest their capital, upon interest, other than in corporation stocks, and public securities.

Here we have seen, that by the laws of the State of Pennsylvania, above quoted and referred to, this "other monied capital in the hands of individuals," residing in Cumberland county, or in the borough of Carlisle, was not subject to taxation for school purposes. Does it not then come directly within the express restriction of the act of February 10, 1868? Did not this taxation unfairly and unjustly discriminate against this National bank stock?

The act of Assembly of Pennsylvania, above referred to, of April 4, 1868, (Pamph. Laws, 61,) provides:

"All mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate, shall be exempt from taxation except for State purposes in the county of Cumberland," &c.

This appears to be absolutely conclusive of the right to assess or levy this tax at all.

II. But if we are mistaken in this, we say next, the mode and manner of assessment was contrary to the letter and spirit of the act of Congress of February 10, 1868.

The tax assessed upon "*other moneyed capital in the hands of individuals,*" by the State of Pennsylvania, is upon the

par or nominal value of such capital. If money be at interest on bond or mortgage, at three, five, or six per cent. interest per annum, the tax of three mills on the dollar is the same in each case. There is no provision in the laws of the State for any assessment of the value of such securities. They are taken at their face and taxed accordingly.

In valuing these shares at fifty per cent. above par the tax is made fifty per cent. greater than on "other moneyed capital in the hands of individuals," and this is clearly contrary to the acts of 1864 and 1868.

I have in my previous brief referred to the case of Van Allen *vs.* The Assessors, 3 Wall., 573. All the provisions of the act of 1864 are predicated upon the par value. In the case last cited the ruling of the court is that the taxes by the State are permitted to be imposed, wholly irrespective of the character or description of the capital of the bank. If this be so it follows that the par value of the share is the limit of valuation. Moreover the individual liability clause is based upon the par value and limited to that. The act itself fixes the value of the shares, and the restriction imposed upon State taxation would be a nullity; if the State officers might arbitrarily assess these shares at $150, why not at $600, and thus make the tax *twenty per cent.* instead of *four*, as in this case. This view is very strongly indicated, if not directly held, in People *vs.* The Commissioners, 4 Wall., 244. In the opinion of his honor, Judge Nelson, on p. 256, he says: "The meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater than upon the moneyed capital of the individual citizen, which is subject or liable to taxation; that is, no greater proportion or percentage of tax, *in the valuation of the shares*, should be levied than upon other moneyed taxable capital in the hands of the citizen." (See also Bradley *vs.* The People, 4 Wall., 459. Also National Bank *vs.* Chicago, 28 Leg. Int., 300; 3 Chicago Legal News, 369. Opinion of Mr.

Justice Miller, National Bank *vs.* Commonwealth, 9 Wall., p. 360.)

III. The question of jurisdiction is discussed in the brief filed upon the motion to dismiss, and furnished with this one to the court. I refer only to the late opinion in Murdock *vs.* Memphis, by Mr. Justice Miller, where the whole subject is reviewed as affected by the act of 1867, and one of the conclusions reached is, that in order to determine whether the case turned in the court below, on a Federal question, your honors will look into the opinion of the State court.

And referring to the opinion of Judge Williams, (Record, pp. 13 and 14,) it will be seen that these Federal questions were distinctly raised and decided against us, or at least set aside as of less importance than the technical question under the State law.

Respectfully submitted.

JOS. CASEY,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1873.

SAMUEL HEPBURN, *Plaintiff in Error*,
vs.
THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE IN PENNSYLVANIA.
No. 456.

MOTION BY DEFENDANTS IN ERROR TO DISMISS FOR WANT OF JURISDICTION.

This motion is made on the ground of want of jurisdiction. And that the particular statute or provision of the statute of the United States, relied upon by the plaintiff in error and decided against, by the State court, does not appear in the record.

This raises three questions:

1st. Does it expressly appear in the record that an exemption was claimed under a statute of the United States, which was disallowed by the State court?

2d. Does it appear by clear and necessary intendment that the question was involved in the decision?

3d. Could the Supreme Court of Pennsylvania have given the judgment it did, without necessarily deciding this question adversely to the plaintiff in error?

The first position of plaintiff in error, in the State court, was, that under the 4th section of the act of Assembly of Pennsylvania of March 31, 1870, *any State or national bank could collect annually from its shareholders a tax of one per cent. upon the par value of all the shares of such bank, and pay the same into the State Treasury on or before 20th January in*

every year, whereupon such shares should be exempt from all other taxation under the laws of that commonwealth.

This national bank accepted the provisions of this act. And before the time limited in it, paid the one per cent., and claimed exemption from further taxation by virtue of the 41st section of the act of Congress, June 3, 1864, 13 Stat., 112; and the act of February 10, 1868, 15 Stat., 34.

And whether these last named statutes, exempted these shares from any other tax than the one per cent., was one of the questions argued and decided in the State court.

No privilege or exemption from any part of the taxation was claimed under the State laws, and it must, therefore, have been under the laws of the United States.

In the case of Crowell *vs.* Randall, 10 Pet., 368, so often referred to, in which Judge Story reviews the prior cases, one of the conclusions reached was:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in *ipsissimus verbis;* but that it is sufficient, if it appears by clear intendment that the question must have been raised and must have been decided in order to have induced the judgment."

This case stands in the very attitude of Smith *vs.* The State of Maryland, 6 Cranch, 286. They claimed exemption there under the treaty. The court decided against the party setting up the treaty. We claimed exemption from taxation under the acts of Congress of 1864 and 1868, and on no other ground, and the State court decided against us.

The same is also strictly true of Martin *vs.* Hunters, lessee, 1 Wheat., 304.

So in Miller *vs.* Nichols, 4 Wheat., 311, 315, Ch. J. Marshall, says:

"It would have been sufficient to give this court jurisdiction, that the record should show that an act of Congress was applicable to the case."

In Wilson *vs.* The Black Cr. M. Co., 2 Peters., 245.

"It is sufficient to bring the case within the jurisdiction, that a law of the United States must have been misconstrued, or the decision could not have been made." So are all the cases reviewed by Judge Story.

In Armstrong *et al. vs.* The Treasurer, &c., 16 Pet., 281. The same doctrine is reiterated, and held that the jurisdiction may be sustained by showing:

"That the State court could not have given the judgment or decree passed, without deciding such question."

To the same point is the case of Bridge Proprietors *vs.* Hoboken Co., 1 Wall., 143, where the same ruling was affirmed.

His honor, Mr. Justice Davis, varies the expression of the same idea, in Freeman *vs.* Nichol, 8 Wall., 56.

"It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did."

The case of Messenger *vs.* Mason, 10 Wall., 507, which appears to require the particular law and clause of the Constitution involved in the case, to be specially set forth in the record, does not appear to be sustained in all its extent, by the current of the decisions upon this point.

Upon the authorities thus far cited, and under the act of 1789, we think there is enough upon this record to sustain the jurisdiction.

It appears, *at least, by necessary intendment*, that the question on these acts of Congress was made in the State court, and decided adversly to the plaintiff in error.

But how stands the case upon the act of February 5, 1867, 14 Stat., 386?

In Dooley *vs.* Smith, 13 Wall., 604, no question on this statute was raised, but the former positions were sustained, Mr. Justice Miller saying:

"We are satisfied, from a careful examination of the record, that this latter question was decided against the validity of those statutes, (legal tender laws,) and that such decision was essential to the judgment rendered."

In one of the last reported cases on the subject, Smith *vs.* Adsit, 16 Wall., 189, Mr. Justice Strong, referring to Crowell *vs.* Randell, Parmelee *vs.* Lawrence, Williams *vs.* Norris, and Rector *vs.* Ashley, says:

"The record must show either expressly or by necessary intendment, not only that a Federal question was raised, but that it was decided adversely to the party, who has caused the case to be removed here."

So in Pennywit *vs.* Eaton, 15 Wall., 380, the jurisdiction was sustained, although *the question was raised obscurely.*

I take it then, on the two acts of 1789 and 1867, under the reported decisions of this court, it must appear by the record either in express terms or by intendment that a Federal question, was involved in the decision of the State court, and that decision must have been adverse to the plaintiff in error.

The question in the case at bar is, do these things appear in the mode required?

The legislature of Pennsylvania, by act of February 23, 1866, enacted:

"It shall be the duty of the cashier of every bank in the Commonwealth, whether incorporated under the laws of this State or of the United States, to collect annually, from every stockholder of said bank, a tax of one per centum upon the par value of the stock held by said stockholder, and to pay the same into the State treasury, on or before the first of July in every year hereafter, commencing on the first day of July, A. D. 1866. And the said stock shall be exempt from all other taxation under the laws of this Commonwealth."

The act of April 12, 1867, Purd. Dig., 1480, pl. 8, 9, 10, 11, 12, 13.

By the 5th section it is enacted:

"Should any National or State bank of this Commonwealth pay to the State treasurer a tax of one per centum per annum upon the par value of the capital stock thereof, the shareholders of said bank shall be exempt from all other taxation on the value of said shares."

The act of April 2, 1868, Purdon, 1534, pl. 13, *et seq.* the 1st section is as follows:

"No stock or share of any National Bank shall be appraised higher than the current value of said stock in the market where such bank is located; and any stockholder shall have the right of appeal to the Auditor General, who shall have the power to adjust such assessments by inquiring into the value of such stock, and either abate or increase the value of the same as may be just and proper."

The 10th section of the act of May 1, 1868, Purd., 1536, enacted:

"It shall be the duty of the cashier of every bank and saving's institution incorporated under the laws of this State, to collect annually from every stockholder of said bank or saving's institution, a tax of one per centum upon the par value of the shares held by said shareholder, and to pay the same into the State treasury on or before the first day of July in every year; and the said shares shall be exempt from all other taxation under the laws of this Commonwealth."

The act of March 31, 1870, Purd., 1643, pl. 4 and 5, provides:

"That the shares of National Banks shall be taxable at the rate of three mills upon the assessed value, and also for county schools, municipal and local purposes, at the same rate as now is, or may be hereafter assessed upon other moneyed capital in the hands of individual citizens of this State."

Section 4 enacts:

"In case any bank or saving's institution shall elect to collect annually from the shareholders thereof a tax of one per centum upon the par value of all the shares of

said bank, and pay the same into the State treasury on or before the 20th day of January in every year, the said shares, capital, and profits shall be exempt from all other taxation under the laws of this Commonwealth."

The main questions raised upon this record were:

First. The right of these local and municipal authorities to assess and tax these shares at all, under the act of March 31, 1870, and the acts of Congress of 1864 and 1868.

Second. The question on the act of Congress is distinctly raised in points 1st and 5th, that the assessments above par were unwarranted and illegal.

I. The record very clearly raises in the 1st and 5th points the two questions—1st. That the local authorities had no right to tax at all; and 2d. If they had, it must be on the par value of these shares.

The opinion of the Supreme Court of the State, that the plaintiff in error was bound to appeal from this invasion of his rights, under the laws of Congress, to an executive officer of a State, whose decision was to be final and conclusive, is a proposition that surely cannot be maintained. Whether he was liable for the tax, and if so, whether the spirit and intention of the laws of Congress, limited the rate to the par of the shares, were purely judicial questions. It was not the ascertainment of the value but the right to exceed the par. It was not the form of assessment, but the right to assess or tax in that manner or to that extent.

The case of Van Allen *vs.* The Assessors, 3 Wall., 573, it appears to me strongly leans against the assessments of these shares, at a greater rate than the par value. The point was directly decided by Judge Blodget. (Chicago Legal News, August 19, 1871.) Holding that an assessment under a State law of Illinois of those shares, at a higher rate than par, was contrary to the design and spirit of the acts of Congress.

Because if the State authorities can arbitrarily fix the value of these shares, the acts of Congress restricting taxation to the rate applied to the monied capital of individuals is illusory and a nullity.

In this case the taxes assessed upon these shares, in addition to the other taxes paid by the bank, amounted to nearly four per cent. upon the par value. A rate sufficient to tax every National Bank in the country out of existence.

Now, the Supreme Court of Pennsylvania, it appears to me, evades the question of the right to tax these shares above par, when it says the plaintiff in error should have appealed to the Auditor General. It was a right secured to him, as he supposed, under an act of Congress, and when assailed he had a right to test the matter in the courts, and have it decided by the Federal Court of last resort. The act of April 2, 1868, sec. 1, is as follows:

"No stock or share of any national bank shall be appraised higher than the current market value of said stock in the market where such bank is located; and any stockholder shall have the right of appeal to the Auditor General, who shall have power to adjust such assessment by inquiring into the value of such stock, and either abate or increase the value of the same as may be just and proper."

Now the Supreme Court of Pennsylvania confounded the mode of executing the power of valuation, with the right to exercise it at all. It was the latter question our points raised. That a subordinate, executive officer like the Auditor General of the State, could determine our right under an act or acts of Congress, in such manner as to preclude judicial congnizance, I submit, with great respect, cannot be maintained.

That is exactly our case. We raised and presented to the Supreme Court of the State, our exemption under the acts of Congress, from assessment of our shares above par. True, says the Supreme Court of Pennsylvania, you did;

but under a law of the State, you must submit that question to the Auditor General of the State, whose decision is final and conclusive. The State legisture can pass no such law. No State court can deprive us of our review here by such disposal of the question.

But the State legislature had no idea of conferring any such right or power upon the Auditor General. It was only intended that he should decide upon the fairness or regularity of the assessment. Far other is the question we raised, and upon which, if permitted, we shall invoke the decision of this court in due time. The question was, whether under the act of Congress of February 10, 1868, 15 Stat., 34, any other than the three-mill State tax could be laid upon these shares.

In this act the clause in relation to State banks, found in the act of 1864, is left out. And the sole restriction is, "that the taxation shall not be at a greater rate than is assessed upon *other moneyed capital* in the hands of individual citizens of such State."

The only tax assessed upon "other moneyed capital in the hands of individuals" by the State of Pennsylvania, is three mills upon the dollar for State and municipal purposes; and this is clearly their limit in regard to these shares under the act of February 4, 1868.

A tax of one per cent. levied upon these shares, by the State authorities, under the Act of Assembly of Pennsylvania, of December 22, 1869, was held by the Supreme Court of that State to be contrary to the act of Congress of February 10, 1868, and, therefore unconstitutional and void. (See Gorgas *vs.* Wetzel, Treasurer (not yet reported). Decided in Autumn of 1872.

Now the case raised distinctly the question of the right to tax these shares for borough, school and county purposes. *The bank had paid the three mill tax* in August, 1870. This, we contended, exempted them from further taxation. The Supreme Court of Pennsylvania decided

against us. Does this raise a question cognizable by this court?

Our positions were, therefore—

1st. That the shares, under the act of Congress, could not be assessed above par.

2d. That they, by the act of Congress of 1868, and the tax laws of Pennsylvania, were not subject in 1870 to any other than a State tax of three mills on the dollar, and not liable to local or municipal taxes at all.

3d. They were exempt by the payment of the tax of one per centum on the par value of their shares under the act of March 31, 1870.

If these federal questions were not in the case, then there could have been no contest, for none was made on the State laws.

But these questions are distinctly made in the case stated; and the decision of the court is against us on all of them. We think the jurisdiction of the court appears by necessary intendment, on the record now before the court.

But if I am mistaken in these positions, then apart from these considerations the question of jurisdiction here is, at least, one of doubt. It depends upon the questions raised and decided in the state court. These can only be fully developed upon the final hearing and argument of the case upon its merits. Such being the case, this court will not undertake to decide this important question upon a motion to dismiss.

And I so understand the ruling of this court in the cases of—

Tucker *vs.* Fowler, 1 Black, 95.
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Semple *vs.* Hagan, 4 Ibid., 431.

In this latter case the court says:

"In many cases the question of jurisdiction is so involved with other questions that the court cannot eliminate it without a careful examination of voluminous records,

and passing upon the merits. When this occurs, the motion will not be granted, but the question of jurisdiction will be heard on the final argument on the merits."

To dismiss this cause on this motion would be to decide this whole case on its merits on a motion to dismiss. This is the very thing denied in Hecker *vs.* Fowler, 1 Black, 95.

I submit, therefor, to the court—

1. That the questions of the right to exemption from the taxes mentioned in the case stated, *is expressly raised*, under the act of Congress of February 10, 1865, and decided against us.

2. If not *expressly* stated they are at least *impliedly and by necessary intendment* raised upon the record, and decided adversely to the plaintiff in error.

3. That if mistaken on both these points, the question of jurisdiction is so interwoven and blended with the merits, that the court will postpone a decision upon the same until the final hearing on the merits. For these reasons we humbly submit that this motion should be denied.

JOS. CASEY,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

SAMUEL HEPBURN, *Plaintiff in Error*,
vs.
THE SCHOOL DIRECTORS OF THE BOROUGH OF CARLISLE IN PENNSYLVANIA.

No 107.

BRIEF FOR DEFENDANT IN ERROR.

This cause comes up by writ of error to the supreme court of Pennsylvania.

The Case.

Certain shares (460) of the capital stock of the First National Bank of Carlisle, Pennsylvania, held by the plaintiff in error, of the par value of $100, were duly assessed by the proper assessor as of the value of $150 per share. The regularity of this assessment is admitted in the case stated. Record, p. 2, par. 2.

The School Commissioners levied a tax of 9½ mills on the dollar on all taxable property in the borough of Carlisle, and the stock of the plaintiff in error was accordingly taxed $655.50.

This tax the plaintiff in error refused to pay, and suit was brought in the Court of Common Pleas, and the case submitted to the court on agreed statement of facts, and certain propositions of law arising thereon, were stated as controlling the judgment.

These propositions are numbered 1 to 5. (Rec., p. 3.)

Most of these propositions of law depend for their solution particularly the 2d, 3d, and 4th, on the laws of Pennsylvania. The 1st and 5th are as follows;

1st. If the court shall be of opinion that any shares or stock of said bank belonging to the defendant were liable to taxation at the rates assessed thereon by the plaintiff at the time the same were assessed for the year 1870, then judgment to be entered for the plaintiff for $655.50.

5th. If the levy and assessment be illegal and void, for the reason that they [the shares] are assessed at the rate of $150 per share, while the par value thereof is but $100 per share, then judgment for the defendant.

The court of common pleas gave judgment for the defendant, but on writ of error to the supreme court that judgment was revised, and judgment was given for the plaintiff. Rec. p,. 12.

I.

Has this court jurisdiction of the cause. [This question is discussed as a separate brief hereto annexed.]

I.

It is here contended that the case is governed by the act of Congress of February 10, 1868, and under that act, a tax can be levied only on the par value.

II.

In the agreed case nothing whatever is said of any exemption or right claimed under any act of Congress.

If any act was relied on, it ought to have been set up in the propositions of law on which it was agreed the judgment should depend.

The act of Congress is first mentioned in the opinion of the judge of the court of common pleas, simply as authorizing the taxation of shares; he did not say whether it did or did not limit the valuation of the shares, and did not apply it to that question, and gave it no construction on that

point but decided that the bank had commuted the tax, and paid the commutation January 19, 1871; and so gave judgment for the defendant. (Rec., p. 8.)

The judge intimates that under the State statute of April 12, 1867, the shares could be taxed only on par value, but says that view becomes immaterial, as the case is decided on another point.

The Supreme Court held that the commutation which was paid by the bank in 1871 was applicable to the tax of 1871, and not for the tax of 1870.

And as to the act of Congress, the court held that it did not apply to the case which was an action to enforce a tax upon the value of the shares as returned by the assessor; that in such an action it was not competent to contest the valuation which had been fixed by the assessor; that the State statute of April 2, 1868, provided an appeal from such an assessment, and that the defendant below having failed to appeal had waived all objection to the valuation, and could not contest it in the pending case. Consequently the Supreme Court decided nothing as to construction of the act of Congress.

III.

It seems clear that a private person may waive a right which he is entitled to claim under a statute of the United States. The words of the 25th section of the judiciary act, 1789, seem to contemplata the necessity of some claim being made by the party entitled and not to require courts to take notice of it. "The title, right, priviledge, and execution specially set up or claimed by either party." And so the decisions of this court require the claim of right to be brought to the attention of the court. At what stage of the proceedings is this to be done?

The Supreme Court of Pennsylvania, said it was to be done in this case when the erroneous act was committed, by the valuation, and not being done, the defendant is

concluded by his acquiescence, and cites:

Clinton School Districts Appeal, 6 P. & Smith, 315
Stewart *vs.* Maple, 20 Ib., 223.
Everett *vs.* London Life Ins., Vol. 9, p. 366.

So if the construction of the act of Congress of February 10, 1868, is drawn in question in this case, it is not to be decided inasmuch as the judgment of the State court is sustained by a matter of State law.

IV.

There is nothing in the terms of lhe act of Congress to limit the valuation of the shares to par, or prevent them being appraised at their full value. Had Congress intended so to limit them, nothing was easier than to say so. Neither in this act nor in the previous act of Congress on this subject is such limitation imposed, but other and different limitations. See act of June 3, 1864, sec. 41, 13 Stat., 111.

And this Court has said in The People *vs.* The Commissioners, 4 Wall., 256, that the true construction of the words, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States," where they are used in the act of 1864, is "that the rate of taxation of the shares should be the same as or not greater than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is no greater proportion or percentage of tax in the valuation of the States should be levied than upon other moneyed taxable capital in the hands of the citizens."

This seems to fix the construction of the act of July 10, 1868.

The State act of March 31, 1870, conforms to it, and only authorizes taxation of national bank shares "at the same rate as now is, or may hereafter be, assessed and im-

posed upon other moneyed capital in the hands of individual citizens of this State."

V.

The brief for plaintiff in error concedes that the shares might be assessed at their real value if other moneyed capital was so assessed. But he says:

1. Some other moneyed capital, viz: mortgages, judgments, recognizances, &c., are exempt from taxation, except for State purposes in the county of Cumberland. (Brief, p. 4.)

2. That the tax upon other moneyed capital in Pennsylvania is upon the par and nominal value of said capital.

These are rather questions of fact than questions of law, and if intended to be the foundation of a decision should have been stated in the agreed case. It is remarkable these objections are not taken then, nor referred in the opinion of either court.

The act of the legislature we have seen is constitutional and in conformity with the act of Congress.

The proceedings under it have been regular, resulting in the valuation and assessment.

It is now proposed in this proceeding to set aside the assessment.

The assessment of property cannot be revised by the courts collaterally. Erroneous assessment by the proper assessors must be corrected by a direct proceeding—appeal, certiorari, etc.

Osborn *vs.* Danvers, 6 Pick., 98.

Dow *vs.* Chicago, 11 Wall., 108, 150, as to importance of.

Albany and W. S. R. R. Co. *vs.* Canaan, 16 Barb., 244.

Van Stienbergh *vs.* Bigelow, 3 Wendell, 42.

Where no remedy is given by Statute, the party has

his remedy by *certiorari*. Van Steinberger *vs.* Bigelow, 3 Wendell, 42.

See also Lawrence *vs.* Caswell, 13 How., 488, 496.

So that if any question could be made here, it would only be that the tax is illegal and void; not erroneous.

Its illegality is attempted to be shown, by reference to an act of the legislature exempting mortgages, &c., from taxation in Cumberland county.

That is a private act being for a certain locality. Dwarris, p. 354.

Statutes are divided into Public and Private, and General and Local. Private statutes, laws and special proceedings must be proved as matter of fact.

Potter's Dwarris, 58.

An excess of valuation or appraisement does not render an assessment illegal or void. Osborn *vs.* The Inhabitants of Danvers, 6 Pickering, 100.

Says J. Wilde, delivering the opinion in this case, that great mischiefs would otherwise ensue. The owner of property is liable to taxation for his personal property, and the assessment is valid, although he is assessed for more than his due proportion. And it is immaterial, whether the excess is caused by including in the valuation, property of which the person taxed is not the owner, or that for which he is not liable to be taxed. His only remedy is by application for an abatement; and upon refusal, complaint, in the nature of an appeal, is to be made to the court of General Errors of the Peace. This remedy is provided by Statute, and when a new right is so created, which at the same time provides a remedy for any infringement of it, that remedy must be pursued. Rep. 309, 6 Mass. Rep. 44. The remedy is adequate and convenient.

If the assessment could be re-examined, it would be impossible for this court to apply the rule contemplated by

the acts of Congress, and of the legislatuae. Sufficient facts are not before the court.

It seems that certain moneyed capital is exempt from taxation in certain counties; other moneyed capital seems to be taxed everywhere. But we submit that the true rule is that adopted by the legislature, by taxing National shares, in a general act applicable to all similar property.

VI.

The taxation of the property of the bank was a distinct tax from that on shares, and legal.

The shares were subject to taxation like any other property of the plaintifi in error.

Shares are a species of property distinct from either the capital of the company or the property of the company; and are liable to distinct taxation.

Van Allen *vs.* Assessors, 3 Wall., 573.
People *v.* Commissioners, 4 Wall., 244.
Tappan *vs.* Merchants' National Bank, 19 Wall., 490.

Conclusion.

We submit the judgment should be affirmed.

CARLISLE & McPHERSON,